SUPREME COURT, U. S.

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No. 988

In the Supreme Court of the United States

OCTOBER TERM, 1969

PRE-FAB TRANSIT CO., APPELLANT

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ILLINOIS

MOTION TO AFFIRM

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Pursuant to Rule 16(1)(c) of the Rules of this Court the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal by a motor common carrier from a final judgment of a three-judge district court (J.S. App. A) dismissing its complaint to set aside an order of the Interstate Commerce Commission (107 M.C.C. 383) which interpreted the scope of the commodity description in the appellant's certificate of public convenience and necessity.

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Appellant, a motor common carrier, is authorized by its certificate of public convenience and necessity (J.S. App. A, 16–17) to transport:

> (A) *Prefabricated and precut buildings or houses,* complete, knocked-down, or in sections, and *all component parts* necessary to the construction, erection, or completion of such buildings or houses, when shipped with same, and
>
> (B) *Buildings,* complete, knocked-down, or in sections, including all component parts, materials, supplies, and fixtures, and when shipped with such buildings, *accessories* used in the erection, construction, and completion thereof. [Emphasis in original.]

In 1966, Miami Transportation Co., Inc., filed a complaint with the Interstate Commerce Commission alleging that Pre-Fab had exceeded its authority by transporting an independent truckload of ornamental iron columns to a general distributor. Since Pre-Fab admitted its carriage of the columns and there was no dispute as to the facts, the case went before a Commission hearing examiner under modified procedures (49 C.F.R. 1100.45, *et seq.;* J.S. App. A, 17). Appellant contended that under its certificate the transportation of the iron columns was proper, but the hearing examiner concluded that neither Part A nor Part B of the certificate authorized such carriage (J.S. App. A, 17).

After full administrative proceedings, the Commission, through Division 1, held that Pre-Fab's certificate did not permit the transportation of independent shipments of ornamental iron columns; Part A did

not authorize independent shipments or movements to general distributors[1] and Part B limited appellant to transporting commodities intended for use in a prefabricated house or building (107 M.C.C. at 389–390). It concluded that appellant's proffered interpretation of the certificate was contrary to the long-standing administrative distinction between "prefabricated building" authority and "building material" authority, and that it was tantamount to a claim of authorization to transport "building materials" (*ibid.*). Appellant sought review of the Commission's order, alleging that the Commission's interpretation of the Part B authority was erroneous, and that it had been denied a full and fair hearing (J.S. App. A, 16).

The three-judge district court unanimously sustained the Commission, holding that the Commission's interpretation was "under all circumstances, the only reasonable conclusion to be reached when measured against the whole context of Pre-Fab's certificate," and that Pre-Fab's interpretation amounted to "a plain and simple unilateral enlargement of its certificated authority" (J.S. App. A, 21). The court also held that appellant had not been denied procedural due process. (*ibid.*) Appellant's motion to amend the judgment or for a new trial was denied (J.S. App. B).

ARGUMENT

1. The primary question presented by this appeal—whether appellant's certificate authorizes the carriage

[1] Appellant subsequently admitted in the district court that under no construction of Part A of its certificate could it transport an independent shipment of ornamental iron columns (J.S. App. A, 19).

of "building materials" generally, as distinct from carriage limited to the prefabricated building industry—does not warrant plenary review by this Court. The district court, after noting that appellant admitted it was not authorized to perform the challenged transportation under Part A, correctly held that the Commission's interpretation of the Part B authority was "the only reasonable conclusion to be reached" (J.S. App. A, 19, 21). The interpretation of a certificate issued by the Commission is primarily a question for that agency. *Service Transfer Co.* v. *Virginia*, 359 U.S. 171. Unless the Commission's interpretation is clearly erroneous, it should be upheld by the courts. *Nelson, Inc.* v. *United States*, 355 U.S. 554, 561. Moreover, the Commission's interpretation of this type of authority is not a matter of first impression: A similar restriction was interpreted in the same manner in *Whitehouse Trucking, Inc.* v. *United States*, 261 F. Supp. 9 (N.D. Ohio), affirmed *per curiam*, 388 U.S. 453.

2. Contrary to appellant's contention (J.S. 10), there was no procedural irregularity in the Commission's disposition of this proceeding. Pre-Fab received full and fair consideration in this proceeding as required by the Administrative Procedure Act. *National Trailer Convoy, Inc.* v. *United States*, 293 F. Supp. 630, 632–633 (N.D. Okla.). Prior to the Commission's decision, appellant had not requested either an oral hearing or a consolidation of the proceeding with any other pending case. The district court, which was "fully aware of its duty to stand watchdog for any procedural due process deficiencies," found that

"the allegations are without substantial merit" (J.S. App. A, 21). The material which appellant claims it was denied an opportunity to present, by the cancellation of a separate hearing in another proceeding, would in no way have justified the transportation of independent truckloads of any commodity under Part A authority (J.S. App. A, 16).[2] Nor is it true as appellant argues (J.S. 11) that the words of art in its certificate had not been previously construed. On the contrary, they were at issue and were discussed in detail, for example, in the underlying Commission report in the *Whitehouse Trucking* case, *supra* (99 M.C.C. 621).

Appellant alleges that the Commission's construction of its certificate in this proceeding was an unexpected departure from prior decisions (J.S. 13). But in the cases relied upon by the Commission, *Ogler Motor Transit Co., Inc.—Ext.—Building Materials*, 94 M.C.C. 638 (Division 1), and *Owens Contract Carrier Application*, 100 M.C.C. 34 (full Commission), the Commission construed the Part B authority against ap-

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[2] The present case was instituted by the filing of Miami Transportation's complaint with the Commission on February 9, 1966. The hearing to which appellant refers was scheduled in another proceeding entirely separate and distinct from this case. Several weeks after the commencement of this case, the Commission ordered a separate, general investigation of Pre-Fab's operations. On demand of appellant, the Commission agreed to exclude from that proceeding any inquiry into the scope of appellant's authority under Part B of its certificate. Thus defined, the hearing would only have dealt with Part A. But, as appellant now concedes (J.S. App. A, 19), Part A does not authorize independent carriage of iron columns.

pellant's position.[1] Thus, appellant's contention that the Commission reversed without notice a consistent administrative construction is incorrect.

CONCLUSION

For the foregoing reasons the judgment of the district court should be affirmed.

Respectfully submitted.

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[1] Since Pre-Fab was a protestant in those proceedings, the Commission invited it to file a petition seeking a definitive interpretation of its operating authority. This procedure was invoked because the district court in *Parkhill Truck Company* v. *United States*, 198 F. Supp. 362 (N.D. Okla.), had held that the interpretation of a protesting carrier's certificate should not be definitively made except after a plenary hearing. Appellant strenuously argued its interpretation of its certificate to the Commission in both the *Oyler* and *Owens* proceedings.

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